SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 62.

ABRAHAM WOLFF, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming the judgment of the supreme court of the District of Columbia, rendered in favor of the defendant in error February 28, 1902 (Rec., p. 6).

STATEMENT OF FACTS.

This is an action of trespass on the case brought by the plaintiff in error against the District of Columbia. Plaintiff's declaration alleges that on the night of the 27th of October, 1895, while going from a house, No. 314 C street, in the city of Washington, District of Columbia, to a carriage in front of said house he proceeded to cross the sidewalk, when he stumbled over a large stone block, which afterwards turned out to be a carriage step; that the step was close to the curb, and fractured his right leg above the knee; the leg was so badly injured it became necessary to ampu-

tate same above the knee; that plaintiff had no knowledge of the existence of said carriage step, and the streets were not lighted sufficiently to see same; that the injury was occasioned through no negligence on his part. Besides the loss of his leg, his health was greatly impaired, and he claimed damages in the sum of twenty-five thousand dollars.

The defendant filed a plea of not guilty, on which issue was joined.

When the case came on for trial the plaintiff proved the following facts: That on the 27th of October, 1895, he was twenty-eight years of age and employed by a Mr. Kozel, on Fourteenth street between T and U streets northwest; that the 27th of October was a Sunday, and plaintiff, in company with his brother, William Wolff, and his sister-in-law and his brother's two children, about eleven o'clock a. m., drove to the country to pay a visit to a Mr. Borchardine, whose place was located in Prince George's county, Maryland, about five miles from the city of Washington. They drove there in a wagon owned by a Mr. Seegar, remaining there all day. About dusk plaintiff returned to the city in company with his brother and sister-in-law and their two children, Mr. Borchardine, and Mr. Seegar, in Mr. Seegar's wagon. After reaching the city they drove to the Saengerbund hall at the invitation of Mr. Borchardine. Mr. Seegar drove them up Four-and-a-half street to C and down C to No. 314, where the Saengerbund club is located. The wagon stopped, and plaintiff and Mr. Borchardine got out and went into the club-house, where they remained for about five minutes, plaintiff indulging in a glass of beer and a cigar. This was between eight and nine o'clock. Coming out of the club, plaintiff preceded Mr. Borchardine and came down the steps, the wagon being drawn up close to the curb in front of the premises 314 C street. While crossing the sidewalk to get into the wagon plaintiff stumbled over a large stone, which afterwards developed to be a carriage block, made of brownstone, about three feet

long, fifteen or sixteen inches wide, and about a foot high; plaintiff further stated that the stone was set on an old red brick pavement; that he was looking where he was going at the time, but was not looking down at the pavement, but was looking straight ahead of him; that he did not see the stone, nor had he any knowledge of a stone being there; that he had never been in that locality of C street between Third and Four-and-a-half streets except once before, and on that occasion he walked from Four-and-a-half street to the Saengerbund hall; no one had ever informed him of the existence of such an obstruction on the sidewalk; there were not sufficient lights to show the existence of the stone; there was a lamp-post on the opposite side of the street, but it did not cast any light on this stone; there was no light in the vestibule of 312 C street on the night of the accident; there was a lamp-post on the same side of the street, on the corner of the alley, but there were two or three trees between the lamp-post and the carriage stone; that the street was dark, although it was a bright, starlight night; that all the trees were of good size and still retained the leaves at the time of the accident; that he believed the wagon had changed its position while he was in Saengerbund hall, but of this he was not certain, but in getting out of the wagon to go into Saengerbund hall he did not observe a stone; does not recall definitely how he got out of the wagon, whether out of the side or out of the rear; thinks he got out by putting his foot on the rear wheel of the wagon; does not believe the stone could have been seen from the steps of Saengerbund hall; that the carriage stone he fell over was to the rear of the wagon; that his intention in crossing the sidewalk was to go around the wagon and get in from the opposite side, so that Mr. Borchardine would not be detained in getting in; plaintiff knows that there were leaves on the trees.

On cross-examination the plaintiff was asked the following questions:

"Q. If you had looked, when you got out of the wagon to go into the Saengerbund, you could have seen that carriage step, could you not?

"A. I don't know; I never looked. I never looked down into the street; I looked ahead. I always do look ahead when I walk.

"Q. If you had looked when you came down from the steps you could have seen the carriage step, could you not?

"A. Certainly, I saw the wagon; I could see the wagon, it was high.

"Mr. DUVALL: That is not my question."

Thereupon the stenographer read the question, and the witness answered:

"A. Not if I looked ahead of myself; not if I looked straight out.

"Q. Were you intending to fly or to walk?

"A. No, sir, it was dark; I could not see that step.

"Q. If you had looked in the direction in which you intended to walk, could you not have seen the carriage step?

"A. I don't think I could.

"Q. Why not?

"A. Because it was dark; certainly, if I were standing on the sidewalk and looked, I think I could have seen it if I had looked down.

"Q. Exactly. When you reached the sidewalk after you had left the steps?

"A. Yes, sir.

"Q. If you had looked in the direction in which you were going, could you have seen the carriage step?

"A. No, sir; I did look in the direction in which I was going, but I was looking straight out before me.

"Q. What were you looking at?

"A. I was looking where I was walking.

"Q. What, were you looking?

"A. I was looking right straight ahead, not with my head down.

"Q. At what object?

"A. Not at any particular object at all.

"Q. You made no observation at all of the point at all where you put your foot, knowing that you had to go to the curb and to go to the gutter, but you did not look at all, is that it?

"A. Certainly, I looked. I could not see any stone there, though."

Mrs. Francis Wolff, a sister-in-law, corroborated all the statements of plaintiff, and testified that she was seated in the rear seat in the wagon, the wagon being an ordinary grocery wagon with a seat across the front; that Mr. Seegar sat on the main seat, and she, with the others, sat on the sides of the wagon; the seats were arranged by boards on boxes running lengthwise with the wagon, and she was seated on the rear seat facing Saengerbund hall after the wagon stopped; that the plaintiff and Mr. Borschardine went into the Saengerbund hall; she and the others remained in the wagon; that they remained inside of the hall probably ten minutes; the plaintiff came down the steps, and, while walking to get into the wagon, fell over the stone; that where she was sitting she could see up the steps of Saengerbund hall; that the wagon stood parallel with the sidewalk, the rear probably a couple of feet east from the line of the steps of Saengerbund hall, and that she could look up the steps from her side; that she did not see the carriage stone until after the plaintiff had fallen over it; there was no light cast upon the stone, and the only lights in Saengerbund hall were from the window; there was no light in the vestibule of the hall. Plaintiff came down the steps like any one else would; seemed to be walking towards the street to get in the wagon when he fell over the stone; after the plaintiff fell she could see more plainly what he had fallen over; the light across the street was between the trees, because, from the reflection of the light, she could see the leaves in the middle of the street. The stone that plain-

tiff fell over was about two feet from the rear of the wagon, on the sidewalk; wagon probably moved a little towards Third street after the plaintiff had gotten out and before he returned; witness could see the plaintiff when he lay in the street, but not very well. When she looked out of the wagon at the stone she was about two feet from it.

Otto Borchardine, another witness on behalf of plaintiff, testified that he was a member of the Saengerbund; that he had invited Mr. Wolff to take a glass of beer and a cigar; that they were in the Saengerbund about five minutes; when coming out plaintiff went down the steps first because he, Borchardine, had to close the door after him; he thinks he was on the platform of the steps, 314 C street, when he saw the plaintiff trip over something; that the street was very dark; there was no light shining on the stone; the stone was a brown stone and placed on an old brick pavement; the stone, to witness' knowledge, had been there since 1889; that there were some trees right near it; there was a light on the alley, on the same side of the street, three or four doors below the Saengerbund hall, and trees in between the light and the stone; there was a light on the opposite side of the street catercornered from 314 C street; neither of these lights shone on the stone; he did not take any notice of the stone that night, but he knew that there was a stone there, as he had seen it many times before. The wagon must have moved towards Third street a little after witness and plaintiff had gotten out and gone into the Saengerbund, but witness thinks the stone was between the two wheels when he got out; that if any one had stepped on the hind wheel in getting out of the wagon they would not have stepped on the stone; he further said that he could not see the carriage step when he was standing on the steps of the Saengerbund; witness was asked if he knew, while he was on the Saengerbund steps, what the plaintiff had fallen over, and he answered:

"I could not say that he fell over the stone; I could not say what he fell over; I could not tell that. I found out that afterwards."

"Q. Did you not see the carriage stone that was at the curb there when he fell; did you not see it?

"A. I could not see it.

"Q. Did he cover the whole of it?

"A. No, but he must have struck the stone with his foot and fell uppermost.

"Q. Did you not see what he had struck?

"A. No, not until after awhile we found out.

"Q. When did you find out what it was that he had struck?

"A. The moment after I came down and seen him lying right over the carriage stone."

Another witness, G. A. SEEGAR, testified on behalf of the plaintiff and corroborated him; could not say whether the wagon had moved up after plaintiff had gone into the Saengerbund; he did not move the horse, but they sometimes take a step ahead or a step back. He testified that he saw the carriage step and knew that it was there; *that when he was ten or fifteen feet away he could not see it, nor could he see it when he was a few feet away from it; but he was walking up and down on the pavement alongside of the wagon and when he got up to the step he could see it.*

Another witness, AMELIA BORCHARDINE, testified that she knew the location of the carriage stone which the plaintiff fell over in 1895, and knew the condition of the lights surrounding it in that year, and that the place where the carriage step is located is very dark, and that she had fallen over it one time herself.

The defendant produced a lot of witnesses who testified to the condition of the lights surrounding the carriage step on other nights than the night of the accident, but did not produce any witnesses who could tell anything about the condition of the lights surrounding the stone on the night of the accident.

On the whole evidence the defendant moved the court to instruct the jury to render a verdict for the defendant on the ground that the plaintiff had failed to make out a case. Over the objection of plaintiff the court granted the motion. The jury returned a verdict, in accordance with the court's direction, for the defendant; to which plaintiff excepted to and appealed to the Court of Appeals, and on the 28th day of October, 1902 (Record, p. 6), the Court of Appeals affirmed the judgment of the supreme court of the District of Columbia and the writ of error was sued out to this court.

ASSIGNMENT OF ERRORS.

1. The trial court erred in holding that as matter of law the jury should be instructed to return a verdict for the defendant.

2. The trial court erred in holding as matter of law that a stepping stone is not an unlawful obstruction.

3. The trial court erred in holding as matter of law that the stone over which the plaintiff fell was a lawful obstruction.

4. The trial court erred in holding that there was no duty on the part of the defendant in error to so light C street northwest as to disclose the existence of this stone thereon.

ARGUMENT.

The record showing so conclusively that the plaintiff in error had no knowledge of the existence of the stone over which he fell, which said stone was upon the sidewalk in front of 314 C street northwest, in the city of Washington, and the record further showing that he did not see the stone at the time that he stumbled over the same, nor could he, on account of the darkness, have seen the same, no question of contributory negligence can arise in this case, and therefore we have the following propositions:

1. Whether or not the stone was an unlawful obstruction *per se.*

2. Whether or not, as matter of law, it was the duty of the District of Columbia to so light this street as to show the existence of this stone thereon, they having full knowledge thereof.

First. Whether or not the stone was an unlawful obstruction per se.

The plaintiff in error contends that this carriage step in question was an unlawful obstruction in the street and a nuisance *per se* on account of the fact that its existence thereon is contrary to sections 222 to 230, inclusive, of the Revised Statutes of the District of Columbia, pages 25 to 26.

Section 222 reads as follows:

> "No open space, public reservation, or other public grounds in the city of Washington, nor any portion of the public streets and avenues of said city, shall be occupied by any private person or for any private purpose whatever."

This section conclusively shows that a private person has no right whatever to use the public streets of the city of Washington for any private purpose, and therefore, when he does so, he violates this section. The testimony in this case shows that this carriage step was used for a private purpose, was no part of the construction of the street or necessary for any municipal purposes or beneficial to the public in general.

That an obstruction on a public street of the city of Washington is a nuisance *per se* was decided in the case of United States *vs.* Cole, 18 D. C., 504. In that case the supreme court of the District of Columbia, in general term, held that a party cannot justify the erection of an obstruction on the streets of the city of Washington by producing a permit from the municipal authorities to make such erection.

The Court of Appeals, in deciding this case, Wolf *vs.* The District of Columbia, 21 Appeals D. C., 464, speaking of carriage steps, say:

> "They are objects allowed and authorized, by immemorial custom and usage, as being necessary to the health, convenience, protection and enjoyment of the homes and lives of the inhabitants of the city,"

and they cite as an authority for this expression certain cases in the State courts; but it must be remembered that in the States, and we might say everywhere else except in the District of Columbia, the fee of the streets is not in the municipality or the State, but in the abutting land-owner, and such land-owner has the right to use the street for his own private purposes so long as he does not inconvenience the public or use the same against some positive law, so that the authorities from the States can have no weight in the question involved in this case. Here the fee is in the United States; here the United States has by statute, sections heretofore referred to, prohibited the placing of obstructions on the streets, avenues, or sidewalks, and therefore

any obstruction thereon, as permanent as the obstruction in this case is shown to be, must necessarily be unlawful.

Under section 229 of the Revised Statutes, it would appear that in some cases the duty of removing these obstructions is placed in the Chief of Engineers, but this cannot in any way affect the duty imposed upon the District of Columbia as a municipal corporation to enforce all laws and regulations for the protection of the inhabitants of said city; but irrespective of the authority attempted to be reposed in the Chief of Engineers in section 229, section 222 refers to *all* obstructions and *all* public streets and avenues of the city of Washington, and does not attempt to limit it to streets, avenues, or sidewalks improved by the United States. These sections here referred to clearly make an obstruction of any kind unlawful, and there is no question but that it is the duty of a municipal corporation to cause all unlawful obstructions on the streets, avenues, etc., to be removed. This is such a well known and understood principle underlying the obligations of every municipal corporation that we shall not cite authorities *in extenso*, but merely refer to the following cases which seem to be in point:

City of Scranton *vs.* Catterson, 94 Pa., 203.
Davis *vs.* City of Austin, 22 Tex. Civ. App., 460.

Davis *vs.* City of Austin is a case where a similar object to the one in question was allowed to remain on the sidewalk, and that court held that it was an unlawful and dangerous obstruction, and the plaintiff Davis was entitled to recover.

We assume that there can be no contention that the District of Columbia is not liable to the same extent that other municipal corporations are, as this question seems to have been well settled in the following cases:

Barnes *vs.* District of Columbia, 91 U. S., 540.
Woodbury *vs.* District of Columbia, 136 U. S., 450.

The defendant in error contended in the Court of Appeals that the sections of the Revised Statutes of the District of Columbia heretofore referred to, taking them as a whole, provided for the removal of obstructions only on streets, avenues, or sidewalks improved by the United States, and that there was no evidence in this record, although the record shows that the street has been improved, that it was done by the United States. It might well be contended that this court could take judicial notice of the fact that the United States is in partnership with the District of Columbia in the improvement and care of all the streets in the city of Washington, and that therefore every improvement of a street in the city of Washington was improved in part by the United States; but it is submitted that there is nothing in this contention, for, if the sections before referred to apply only to those streets improved by the United States, there is in effect in this District, as far as unimproved streets are concerned, the ordinance of the corporation of Washington enacted on November 22, 1862, which ordinance provides as follows:

> "No open space, public reservation, street, or any public grounds in this city shall be occupied by any private person, or for any private purpose whatever, under a penalty of not more than fifty dollars, nor less than twenty-five dollars per day for every day or part of a day such place shall be occupied, to be collected as other fines, penalties and forfeitures are collected for the use of the city."

And therefore it is not necessary for us, in order to show that this carriage step is an obstruction *per se*, to go into the question of who improved this street. It might, however, be contended that the invoking of this ordinance would admit that the District of Columbia had authority to permit persons to place obstructions in the streets. The invoking of this ordinance in no way admits such to be the law. It has been decided that a permit is of no value and that the

occupation of the public streets, spaces, etc., by a private person for private purposes is unlawful, but it has not been decided that the District of Columbia cannot, in cases that do not come within the act of Congress heretofore referred to, provide a punishment for those persons who unlawfully use the streets.

District of Columbia *vs.* Libbey, 9 App. D. C., 321.
Curry *vs.* District of Columbia, 14 App. D. C., 423.

The attorneys for the District of Columbia in the Court of Appeals, without proving any such ordinance existed, cited as an authority for placing this stone on the public streets page 23 of the Police Regulations passed March 12, 1895, which reads as follows:

> "Carriage blocks shall not exceed in dimensions 30 inches by 15 inches, by 8 inches in height."

If the District of Columbia had power to pass this ordinance, which power, we insist, does not exist, the facts in this case show conclusively that the stone here in question violates this ordinance. Therefore it would appear that instead of this ordinance, if valid, justifying the erection of the stone it would make it an unlawful obstruction *per se* if the stone in its shape violates the ordinance.

Mrs. Francis Wolff (Record, p. 17), speaking of the stepping stone as she called it, says:

> "It was about ten or twelve inches high, witness thinks, and the width was about the same, and in length about two and a half to three feet, but witness is not sure."

Otto Borchardine (Record, p. 20), speaking of this stone, says:

> "The street was very dark, according to my knowledge, and there was no light shining on this stone

> that I saw. I guess it was a brown stone, and the size might be from twenty-two to twenty-four inches in length, by ten to twelve inches in height, and sixteen or eighteen inches wide."

G. A. SEEGAR (Record, p. 23), speaking of this stone, says:

> "That there was no light on the stone, and that it was a dark brown sandstone in color, and the pavement was an old brick pavement with many holes in it, and that the stone was about one foot high and about twelve to fifteen inches wide, and the witness thinks it was about two feet long."

Against this the defendant offered the testimony of EDWARD V. MURPHY (Record, p. 27), who could not testify in regard to the stone in question, but states that there was a similar stone in front of his brother's house, No. 312 C street; "that it (speaking of the stone in front of his brother's house) was a brownstone step, something like two feet long, possibly one foot wide, or a little more than that."

And further the defendant produced GEORGE C. BURNS, who testified "that the dimensions of the carriage step in front of No. 312 C street (being the adjoining house to Saengerbund hall) are twenty-nine and three-eighths inches long, thirteen and three-fourths inches wide, and with a rise from the sidewalk of seven and one-fourth inches;" but this witness does not testify that he ever measured same, and you cannot take the testimony of this witness as conclusive on this point when the record shows the other testimony in this case. Neither Murphy nor Burns ever measured the stone here in question, and Murphy never, other than by looking at the two, made a comparison between the two stones, so that even if it were admitted that Burns measured the one stone, that could not be conclusive of the size of the stone here in dispute, and the question of fact involved in its size would be one that would have to be decided by a jury.

The Court of Appeals, in holding that the obstruction here in question was a lawful obstruction, relied upon the case of Dubois *vs.* Kingston, 102 N. Y., 219, and on the case of Robert *vs.* Powell, 168 N. Y., 411. While contending on our part that these cases cannot apply to an obstruction that exists on the streets in the city of Washington, still an examination of these cases will show that the decision rested upon the question of contributory negligence, and what is therein said about an obstruction of this character being a lawful obstruction is mere *obiter dictum*. On authority of the case in 102 N. Y. rests all of the other decisions on this point, and in no decision do we find the question carefully considered except in the case of Davis *vs.* The City of Austin, 22 Tex. Civ. App, 460, where the court, after a careful consideration, arrives at a different conclusion.

It is submitted that the trial court erred in holding this a lawful obstruction.

Second. Whether or not, as matter of law, it was the duty of the District of Columbia to so light this street as to show the existence of this stone thereon, they having full knowledge thereof.

The record shows that C street at the place where this carriage step was situated was so dark that the carriage step could only be seen at a distance within six feet, although there was no obstruction between it and those approaching it; that it was very dark at this particular part of the street, and that other people had fallen over the carriage step.

The duty of the municipality of the District of Columbia to properly light the streets is fixed by sections 232 and 233 of the Revised Statutes of the District of Columbia, page 27.

Section 233 reads as follows:

> "The proper authorities are directed to increase, from time to time, as the public good may require, the number of street lamps on any of the streets, lanes,

alleys, public ways and grounds in the city of Washington, and to do any and all things pertaining to the well lighting of the city."

Here we have the direct duty imposed upon the municipal government to properly light its streets, and it can hardly be supposed that this duty was fulfilled when lamps were so placed in this street that when lighted they failed to disclose objects the size of this stone. The testimony shows conclusively that this stone could not be seen unless you were right at it. Can it be contended for a moment that there was not such a duty imposed on the District to light the streets so that the person traveling thereon could see objects such as the object here in question? If it is not incumbent upon the District to so light the streets, what are the lights for? Where this duty is imposed a person has a right to suppose that such duty is performed, and a traveler lawfully on the public sidewalk is not compelled to use extreme and extraordinary care while using such sidewalk.

Did not the plaintiff in error have a right to assume that the street was free and clear of obstructions and in using same he would only be required to use such care as a reasonable, prudent man would use, assuming the sidewalk to be free from any obstructions, or, if there were obstructions on the sidewalk, the same would be observable from a reasonable distance; or, in other words, that a light placed on a street by the municipal authorities would be sufficiently bright to disclose any objects at a reasonable distance that may be in a pedestrian's path, and if this is so, which we contend is the law in this jurisdiction, then the facts as disclosed by the record in this case unquestionably establish such a case as would allow plaintiff in error to have his case tried before a jury.

The defendant in error will cite certain authorities to sustain the position that it is not incumbent upon a municipal government to light its streets. These authorities are from

State courts, and can in no way be applicable to this case, as here we are governed by the act of Congress which imposes the duty upon the defendant in error to properly light its streets.

The Court of Appeals, in speaking of this question, says:

> "But whatever insufficiency may have existed in the light upon the occasion of the accident, (if any in sufficiency did in fact exist) such an action as the present is not the remedy for the consequences of such defect. Money is annually appropriated by Congress for lighting the streets of the city; but whether such appropriation be sufficient or insufficient the courts cannot determine; nor can they determine how the lights should be distributed through the city; or how any part of the street or section of a street shall be lighted, whether by few or many lights, or whether by gas or electricity. These are matters that are confided exclusively to the judgment and discretion of the municipal authorities."

If this statement of the Court of Appeals be law in the District of Columbia, then the District of Columbia is not liable for any injury sustained by any person upon the public streets of the city of Washington, unless that injury be sustained by the commission and not the omission of an act or acts of the municipality. We concede that the citizens of the District of Columbia have nothing to say as to what streets shall be improved; as to how much money shall be appropriated for that purpose. We concede that Congress can give them a certain sum of money and can, by its act, regulate the use thereof, but can this for a moment in any way affect the liability of the municipality?

This court has held over and over again that the District of Columbia is liable for injuries that are occasioned by defective streets, as, for instance, a hole in the sidewalk, a bad sewer trap, and defects of that character, and the District of Columbia has never yet attempted to set up in cases of this character the fact that Congress gave them no money to

remedy the defect. Can it be said for a moment that they would not be liable for an injury occasioned by lumber placed in the street because they had not sufficient appropriation to remove it or sufficient money to buy lights and oil to show where it is situated? It is submitted that any such contention is absolutely contrary to all authority, and that the only question here involved is the question of duty, and that the defendant has no right to attempt to relieve itself of liability by attempting to set up any such contention.

In this case the defendant in error made no such contention and the record is entirely silent on that point. There is no evidence that they did not have sufficient funds, and, even if they had, that would not be a defense, as before stated, for such a defense would not be recognized by any authority in existence other than the expression of the Court of Appeals in this particular case.

It is therefore respectfully submitted that the judgment of the Court of Appeals should be reversed and the case remanded to them, directing them to reverse their judgment and remand the case for a new trial.

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